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Supreme Court, U.S.
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No. 87-1401

In The

Supreme Court of the United States

October Term, 1987

CARGILL, INCORPORATED,

Petitioner,

v.

CHARTER INTERNATIONAL OIL COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the issues presented on appeal to the Eleventh Circuit were moot because Cargill failed to obtain a stay pending appeal.

2. Whether the Bankruptcy Court had authority to conduct the January 17 Hearing, receive bids and approve the sale of the NPC Assets.

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STATUTES INVOLVED

Bankruptcy Reform Act of 1978, Sections 102(1), 363(b) and 363(m). The pertinent text of the statutes involved is set forth on page 22 of the Appendix to Cargill's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On April 20, 1984 (the "Petition Date"), Charter International Oil Company ("CIOC"),[1] Northeast Petroleum Company's ("NPC") ultimate shareholder, filed a petition for reorganization under Chapter 11 of the Bankruptcy Code (the "Code") and continued the operation of its business as debtor in possession pursuant to §§1107 and 1108 of the Code.

On December 16, 1985, NPC and Cargill, Inc. executed an agreement (the "Contract") by which NPC agreed to sell substantially all of its assets (the "NPC Assets") to Cargill. By §§7.6 and 8.5 of the Contract, NPC and Cargill agreed that (i) the consent of CIOC was required for this sale, and, therefore, (ii) Bankruptcy Court approval in CIOC's Chapter 11 proceedings was required.

Pursuant to these contractual requirements, CIOC filed a motion (the "CIOC Motion") seeking Bankruptcy Court approval "to consent to and cause the sale" of the

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[1] A list of CIOC's shareholder, subsidiaries (except wholly owned subsidiaries) and affiliates is attached as Exhibit A.

NPC Assets and to schedule a hearing date. The Bankruptcy Court entered an order (the "Scheduling Order") scheduling a hearing on the CIOC Motion for January 17, 1986 (the "January 17 Hearing"). As required by the Scheduling Order, CIOC timely served the CIOC Motion, the Scheduling Order and the related notice of hearing (the "Notice of Hearing") to all interested parties.

The Scheduling Order established procedures for third parties to make competitive bids for the relief sought in the CIOC Motion and established a deadline of January 14, 1986 for making such bids. CIOC did not receive any bids by this deadline. Cargill was aware that the Contract, the Scheduling Order and the Notice of Hearing expressly contemplated competitive bids.

At the January 17 Hearing, the Bankruptcy Court found that it was in the best interest of CIOC's estate for CIOC to consent to and cause the sale of the NPC Assets. The Bankruptcy Court then vacated that part of the Scheduling Order which set a deadline of January 14 for making competitive bids and solicited oral competitive bids in open court.

Cargill, under protest, and Atlantic Petroleum Corporation ("Atlantic") made bids. Atlantic bid the highest, $2,303,000 more than the Contract price (the "Contract Price"). Counsel for CIOC was directed to prepare an order authorizing a sale to Atlantic.

On January 21, 1986, before the entry of an order regarding the January 17 Hearing, Cargill filed a motion to reopen the January 17 Hearing (the "Cargill Motion") on the grounds that Cargill was surprised and

prejudiced by the Bankruptcy Court's acceptance of bids after the deadline set forth in the Scheduling Order.

On January 27, 1986, a hearing was held on the Cargill Motion (the "January 27 Hearing"). CIOC supported the Cargill Motion to preclude any argument that Cargill had been prejudiced (by being unprepared for bidding) at the January 17 Hearing. The Bankruptcy Court granted the Cargill Motion at the January 27 Hearing and called for further competitive bidding. After extensive bidding, Cargill bid the highest, $5,073,000 more than the Contract Price and $2,770,000 more than Atlantic bid at the January 17 Hearing. The Bankruptcy Court authorized a sale to Cargill and counsel for CIOC was directed to prepare an appropriate order.

On February 3, 1986, the Court entered an order authorizing CIOC to "consent to and cause" the sale of the NPC Assets to Cargill (the "Approval Order"). Three days later, on February 6, 1986, Cargill purchased the NPC Assets, paying to NPC the entire price Cargill bid for the NPC Assets, $112,876,000.

Subsequently, Atlantic appealed the Approval Order. Cargill cross-appealed the Approval Order, contending that it should be required to pay only the Contract Price rather than the higher amount it voluntarily bid for the NPC Assets. Atlantic subsequently dismissed its appeal, but Cargill did not dismiss its cross-appeal.

On December 12, 1986, the United States District Court for the Middle District of Florida entered an

order affirming the Approval Order and dismissing Cargill's appeal on the basis that (i) the proceedings were "core proceedings" and (ii) the Bankruptcy Court did not abuse its discretion by refusing to confirm the sale at the Contract Price and allowing competitive bidding.

On December 18, 1986, CIOC's plan of reorganization (the "CIOC Plan") was confirmed by the Bankruptcy Court. On March 31, 1987, the CIOC Plan was consummated and CIOC made its final distribution to its creditors. The proceeds of the sale of the NPC Assets constitute a material portion of the cash CIOC distributed to its creditors pursuant to the CIOC Plan. Without such proceeds the CIOC Plan would not have been feasible.

Cargill subsequently appealed the decision of the District Court and on October 13, 1987, the United States Court of Appeals for the Eleventh Circuit dismissed the appeal on the grounds that the issues presented were moot under §363(m) of the Code.

SUMMARY OF ARGUMENT

The decision of the Eleventh Circuit affirming the District Court's dismissal of this action is not of special importance to the public and is not in conflict with any decision of this Court or the various Courts of Appeal.

Furthermore, the Eleventh Circuit correctly held the appeal moot under §363(m) of the Code because the

relief Cargill is seeking would require the upset of a sale which Cargill failed to stay pending appeal.

Even if the issues were not moot, the Bankruptcy Court had the authority to conduct the January 17 Hearing because the parties, pursuant to the Contract, expressly conditioned the sale of the NPC Assets on Bankruptcy Court approval.

ARGUMENT

I. The issues presented on appeal to the Eleventh Circuit were moot because Cargill failed to obtain a stay pending appeal.

Section 363(m) of the Code eliminates judicial relief on an appeal from an order authorizing the sale of property under §363(b) of the Code when the sale was not stayed pending appeal.[2]

Courts have uniformly held that all issues relating to the sale of a debtor's property under §363(b) are moot if the sale is not stayed pending appeal. *See In re*

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[2] Section 363(m) states:

> The reversal or modification of an appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

Sax, 796 F.2d 994 (7th Cir. 1986); *In re Abbotts Dairies of Pennsylvania*, 788 F.2d 143 (3rd Cir. 1986); *In re Exennium*, 715 F.2d 1401 (9th Cir. 1983).

The issues presented by Cargill on appeal were moot because the sale of the NPC Assets is controlled by §363(m). No section other than §363(b) could have been arguably used to accomplish Cargill and CIOC's requirement of Bankruptcy Court approval of the sale. *See In re Sax*, 796 F.2d at 997-8. Furthermore, it is not disputed that Cargill is a good faith purchaser and that it did not obtain a stay of the sale pending appeal. Accordingly, this proceeding fits squarely within the language of §363(m).

Cargill is essentially asking this Court to create an exception to §363(m) which would allow *a purchaser* to appeal an order authorizing a sale without obtaining a stay (that is, to pay the price, take possession of the asset, and then appeal that part of the deal he did not like). There is no basis to do so, however, because §363(m) by its express terms governs all §363(b) authorizations, and nothing in the statute, legislative history, or case law creates or even suggests any exceptions to §363(m). Indeed, because of the policy of finality of orders of the Bankruptcy Court, courts have refused to create exceptions to §363(m).

> The courts should follow statutory provisions precisely; to look for exceptions would increase litigation, which would seriously undermine the finality and certainty imposed by §363(m).
>
> *In re Sax*, 796 F.2d at 998.

Furthermore, the "practical necessities involved in a successful reorganization" require that unless an order of a bankruptcy court is stayed pending appeal, the debtor's acts in accordance with that order should not be subject to reversal. *Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 189 (9th Cir. 1977). To reverse the Approval Order and require CIOC to return $5,073,000 of the purchase price to Cargill almost one year after consummation of CIOC's plan of reorganization would not only be contrary to the policy of finality but would be disruptive to CIOC's reorganization. Such result would be especially troublesome because Cargill, by paying fair market value for the NPC Assets, has suffered no harm. Cargill was well aware of the bidding process in the Bankruptcy Court. At the January 17 Hearing the Court stated:

> [e]veryone in the world knew we were coming to this hearing to deal with this matter this morning, just as we are dealing with it.
>
> ***
>
> . . . anyone who comes in this courtroom knows that the Court deals with these matters at a public hearing and lets it go to the highest and best bidder.
>
> January 17 Hearing,
> Transcript R.3-24, 25.

Cargill responded:

> . . . that's basically how we were lead to believe that this hearing would be conducted . . .
>
> January 17 Hearing,
> Transcript R.3-25.

Furthermore, any prejudice Cargill may have suffered by not being prepared to bid at the January 17 Hearing was cured by the Court's order reopening the bidding at the January 27 Hearing at Cargill's request.

In its Petition for Writ of Certiorari (the "Petition"), Cargill argued that §363(m) is not applicable because Cargill is not seeking to modify or reverse the Approval Order but rather seeks "damages" as a result of the Bankruptcy Court entertaining bids at the January 17 Hearing. This argument is without merit and was properly dismissed by the Eleventh Circuit on the grounds that the appeal *is from the Approval Order*; it necessarily effects the validity of the sale, and the Court could not "order" the return of the $5,073,000 to Cargill without modifying or reversing the Approval Order.

Cargill further argued that by executing the Contract, it gained a contractual interest in the NPC Assets. This argument ignores the express provisions of the Contract by which *Cargill* required Bankruptcy Court approval as a condition to its obligations under the Contract:

> The obligations of Purchaser under this Agreement shall be subject to the satisfaction, on or prior to the Closing Date, of all of the following conditions . . .
>
> ***
>
> 7.6 *Approval of Bankruptcy Court.* Seller shall have given timely notice of the application for the Approval Order and the hearing thereon in a manner in which, and to each person and entity to whom, it is required by the Bankruptcy Code, 11 U.S.C. Section 101 *et. seq.*, to give such notice. At

> least fourteen (14) calendar days prior to the Closing Date, the Bankruptcy Court shall have entered an Approval Order in the Reorganization Proceedings with respect to this Agreement, and no stay of such Approval Order shall have been entered as of the Closing Date.
>
> Section 7.6 of Contract;
> *See also*, Section 8.5
> of Contract.
>
> 1.4 *Approval Order*. "Approval Order" with respect to an agreement *means a final order of the Bankruptcy Court pursuant to the Reorganization Proceedings [CIOC's] authorizing the sale of the Acquired Assets and otherwise approving the execution, delivery and performance by Seller of this Agreement.*
>
> Section 1.4 of Contract
> (emphasis added).

Accordingly, Cargill did not acquire a contractual interest in the NPC Assets until the Bankruptcy Court entered the Approval Order on February 3, 1986.

Cargill argues that this Appeal is of special importance because the decision of the Eleventh Circuit would allow bankruptcy judges to insulate their §363(b) orders from review by Article III courts by refusing to grant a stay pending appeal. This argument ignores Bankruptcy Rule 8005 which enables a district court to grant a stay pending appeal of a bankruptcy court's order (Cargill sought no such stay). Accordingly, the Eleventh Circuit's decision does not insulate §363(b) sales from appellate review. Appellate review of bankruptcy court decisions, just like appellate review of district court decisions, is available, *but only when the*

proper procedures are followed. See In re Sax, 796 F.2d at 999.

Cargill further argues that a properly justiciable issue remains in the Bankruptcy Court because Cargill has filed a proof of claim (the "Claim") in CIOC's Chapter 11 case for alleged damages for unjust enrichment of CIOC's estate because the Bankruptcy Court received bids at the January 17 Hearing. As Cargill admits in pleadings relating to the Claim, the Claim creates no independent justiciable issue but is directly related to, and dependent on, the outcome of Cargill's appellate effort:

> During the pendency of this appeal, [the Bankruptcy Court] *lacks jurisdiction* to determine the Debtors' liability on the Class 2 claim of Cargill because the *basis for that claim is precisely the subject matter of that appeal.*
>
> ***
>
> The appeal of the case *underlying the Claim* pends before the Eleventh Circuit.
>
> Answer of Cargill to Objections by Debtors to Certain Disputed Claims, pages 2 and 3 (emphasis added).

Debtors' liability for the debt alleged in the Claim cannot be determined until disposal of Cargill's appeal by the Eleventh Circuit.

> Motion of Cargill to Stay Proceedings Concerning the Objections of Debtors' to the Allowance of the Administrative

Claim Filed by Cargill, Inc., page 2.

Nowhere in any of the pleadings filed by Cargill relating to the Claim does Cargill make a claim for "damages" suffered through unjust enrichment of CIOC. To the contrary, the Claim was filed for the sole purpose of preserving a claim in CIOC's Chapter 11 case should Cargill win on appeal. Once the appeal is resolved, no justiciable issue will remain. Furthermore, if Cargill's argument is accepted, it would allow an appellant who has not sought or obtained a stay pending appeal to circumvent §363(m) merely by filing a proof of claim.

Cargill's argument that the decision below conflicts with this Court's decision in *Bank of Marin v. England*, 87 S.Ct. 274 (1966), the Ninth Circuit's decision in *Matter of Combined Metals Reduction Co.*, *supra*, and the District of Columbia's decision in *In re AOV Industries*, 792 F.2d 1140 (D.C. Cir. 1986) is incorrect. None of these decisions held that §363(m) allows a purchaser to appeal a §363(b) sale without obtaining a stay of that sale. *Bank of Marin* does not involve a sale of property or even mention §363(m). *AOV Industries* and *Combined Metals* actually support CIOC's position. In each case, the Court held that the issues relating to the appeal of a §363(b) sale are directly controlled by §363(m) and therefore the appellant's failure to obtain a stay rendered all issues involving the sale moot. In each case, the only issues which were not moot were those issues relating to the confirmation order which are not directly controlled by §363(m).

Cargill has failed to cite any appellate decision reversing an order of a bankruptcy court authorizing a

sale that was not stayed pending appeal. Cargill's reliance on *Matter of Chung King*, 753 F.2d 547 (7th Cir. 1985), is misplaced. In *Chung King*, the court did not rely on or even mention §363(m) because it was not applicable. The appeal was not from an order authorizing a §363(b) sale, but rather from an order vacating a confirmed sale.

After the Approval Order was entered by the Bankruptcy Court, Cargill nevertheless went ahead and purchased the NPC Assets, voluntarily paid the money it now seeks to recover, and further sat by while that money was ultimately distributed to CIOC's creditors–all without ever seeking a stay from any court. Although perhaps a source of embarrassment for Cargill, this is not a matter of great public importance, and it is moot.

II. The Bankruptcy Court had authority to conduct the January 17 Hearing, receive bids and approve the sale of the NPC Assets.

Cargill argues in its Petition that §102(1)(b) of the Code absolutely precluded the Bankruptcy Court from holding the January 17 Hearing and entering the Approval Order because no objections to the sale were filed. This argument is contrary to the language of the statute, its legislative history and the written agreement of CIOC and Cargill.

By its express terms, §102(1)(a) permits a bankruptcy court to conduct a hearing when the court determines that it is "*appropriate in the particular circumstances*".

> [The] decision with regard to appropriateness must be made on a case by case basis by the bankruptcy court applying its expertise in the context of the individual circumstances of the case.
>
> 2 *Collier on Bankruptcy*, 102.02 at 102-5 (15th ed. 1986).

Here, the bankruptcy judge determined that court approval of the sale of the NPC Assets was appropriate because he was well aware that the proceeds of the sale would constitute a material portion of the cash distributed to CIOC's creditors.

> However, I think that I would like to give anyone an opportunity who wishes to speak on behalf of or against the motion, *because it does enjoy a particular important place in this case.*
>
> January 17 Hearing, Transcript R.3-16 (emphasis added).

It's hard to imagine that it would *not* be "appropriate" for the Bankruptcy Court to approve a debtor's required consent to the sale of a subsidiary's assets for more than $112 million.

Furthermore, the legislative history of §102 demonstrates that the absence of an objection does not prevent a bankruptcy court from conducting a hearing and approving a sale when it determines that such approval is appropriate.

> The phrase "such opportunity for a hearing as is appropriate in the particular circumstances" is *designed to permit the Rules and the courts to expedite or dispense with hearings when speed is essential.*

> H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 315 (1977); S Rep. No. 95-989, 95th Cong., 2nd Sess. 27 (1978) (emphasis added).

> [If] appropriate notice is given and no party to whom such notice is sent timely requests a hearing, then the act sought to be taken *may be taken* without an actual hearing.
>
> 124 Cong. Rec. H 11,090 (Sept. 28, 1978); 124 Cong. Rec. S 17,407, (Oct. 6, 1978) (emphasis added).

Cargill cites no statute, legislative history or case law which states that a bankruptcy court *must* refrain from conducting a hearing when no objections are filed. Moreover, it is well-settled that there is

> . . . nothing in the statutes of the Bankruptcy Code, its legislative history, or case law, indicating that the Court should acquiesce to a proposal that estate property be sold at a price vastly beneath its appraised market value.
>
> *In re Cossett*, 51 B.R. 166, 168 (Bankr. S.D. Ohio W.D. 1985).

If the Bankruptcy Court is deprived of its authority to refuse to confirm a sale, there is no guard against property being sold at a price "vastly beneath its fair market value." The Bankruptcy Court would be required to confirm every sale, which was not objected to, regardless of whether the debtor received fair value. Such result directly contradicts the governing principle

of any bankruptcy proceeding, which is to secure the highest price for the bankrupt's estate and to protect the interest of the creditors. *Matter of Chung King*, 753 F.2d at 547.

Perhaps most significantly, Cargill ignores the undisputed fact that *Cargill required* CIOC's Bankruptcy Court approval as a condition to Cargill's performance under the Contract. Although §102(1) of the Code authorizes a sale of the Debtors' property without bankruptcy court approval upon notice if no objections are filed, it is not, and cannot be error for a bankruptcy court to have a hearing, entertain bids and approve a sale where expressly contemplated by contract.

> Court approval is not necessary in the absence of an objection unless *the terms of sale, as in the sale presently before the court, require approval of the court.*
>
> *In re Governor's Island*, 45 B.R. 247, 254 (Bankr. E.D. N.C. 1984) (emphasis added).

Finally, Cargill argues that the Bankruptcy Court should not have received bids at the January 17 Hearing because its role was limited to the approval or disapproval of the Approval Order. This argument not only ignores the Contract requirement for Bankruptcy Court approval but also contradicts the well established rule that a bankruptcy court may receive higher bids at a hearing involving the sale of property in order to maximize the assets available for the creditors. *See Matter of Chung King, supra*; *In re Abbotts Dairies of Pennsylvania, supra.*

CONCLUSION

Based on the foregoing, CIOC respectfully requests this Court to deny Cargill's Petition for a Writ of Certiorari. In any event, the relief sought by Cargill cannot be granted. If the Bankruptcy Court erred in not authorizing the sale of the NPC Assets to Cargill at the Contract Price, the proper relief on appeal is not to award Cargill monetary damages but rather to vacate the Approval Order.

Respectfully submitted,

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EXHIBIT A

CHARTER INTERNATIONAL OIL COMPANY'S
SHAREHOLDER
AFFILIATES AND SUBSIDIARIES
(excluding wholly owned subsidiaries)

Charter Oil Company
Acorn Investment Company
Bulletin Company
American Independent Distributors, Inc.
Charter Publishing Company
Mason/Charter Publishers, Inc.
Charter Media Company
San Francisco Broadcasters, Inc.
The Charter Guild, Inc.
Chartcom, Inc.
KSLQ, Inc.
San Diego Broadcasters, Inc.
St. Francis Ltd.
WMIL, Inc.
WMJX, Inc.
Charmac, Inc.
Charter Facilities, Inc.
Charter Northshore Company
Charter Capital Corporation
Charter International Reinsurance Company B.V. (i.l.)
Charter Reinsurance B.V.
Charter Reinsurance Nederland B.V.
Charter International Finance N.V.
COFI Credit Corporation
Dayton Press, Inc.
St. Johns Advisory Company
St. Johns Realty Investors
Timber Purchase Company
Grande Alliance Co. Ltd.
Acorn Trading Company
Alaska Oil Company, Inc.
Charter Oil (U.K.) Limited
Charter Futures Trading Company
Charter Oil (UK Trading) Limited
Charter Oil (Alaska), Inc.

Alaska Oil Company
Acorn Pipe Line Company
Acorn Properties, Inc.
Charter Caribbean Company
Charter Hospital, Inc.
The Charter Company
Prospect Company, Ltd.
New CORAL Ltd.
Cayman Overseas Reinsurance Association Ltd.
New Providence Assurance Company Limited
Bahamas Underwriters Services Limited
St. Ives Company Ltd.
Charter Crude Oil Company
Charter Dental Hospital, Inc.
Grove Oil Overseas Services Limited
Lybert Petroleum Limited
Charter (Iran) Petroleum Company
Charter Aquaculture (Ireland) Limited
Charter Colorado Resources Company
Charter Hotels (Jersey) Limited
Charter Marketing Company
Mr. B's Oil Co., Inc.
Mr. B's Food Mart, Inc.
Miss Company
Charter Oil Abu Dhabi Corporation
Charter Oil (International), Inc.
Charter Oil Services, Inc.
Charter Stevedoring Company
Charter Venezuela Petroleum Company
Grove Oil Limited
Independent Petrochemical Corporation
Luqa, Inc.
MTC Terminal Company
Multi Mineral Corporation
COFI Credit Corporation
COFI Credit (Massachusetts), Inc.
Antilles Oil Company, Inc.
Caloil Inc.
Charter Crude Oil Trading Company
Charter Oil Eastern Corporation
Charter Oil Eastern Production, Inc.

Charter Oil (Overseas) Limited, Inc.
Bahamas Oil Refining Company
Borco Towing Company Limited
Grand Bahamas Petroleum Company Limited
Charter Oil Specialties Limited
Borco Desulfurization Company
Borco Marine Company
Freeport Trading Co. Limited
Marine Agents and Brokers Limited
NEPCO INC.
Nepco (Florida), Inc.
Nepco Exploration (U.K.) Limited
Vatra Fuels, Ltd.
North American Oil Traders Limited
Nepco Petroleum Limited
Nepco Petroleum (U.K.) Limited
New England Petroleum Corporation
Nepco Energy Corporation
Oswego Barge Corporation
Charter Advisory Company
Charter International Development Company
Charter Leasing Company
Preferred Oil Company, Inc.
Quebec Oil Refinery, Ltd.
Senex Company Limited
World-Wide Petroleum Products Limited
Nepco Trading Company
Charter Oil (Bahamas), Inc.
Charter Oil (Bahamas) Limited
Valdez Oil Inc.
Ronald P. Webb
Miss Holding Co.